

Capturing Bulgaria's Justice System: The Homestretch

Radosveta Vassileva

2019-01-09T13:23:33

On 18 December 2018, Magistrats Européens pour la Démocratie et les Libertés (MEDEL) [announced](#) that it had sent a letter to the European Commission in which it raised concern about the lack of independence of the Bulgarian judiciary, naming *inter alia* the “recurrent pressures” faced by the President of Bulgaria’s Supreme Court of Cassation.

While focusing on other EU members facing challenges in the area of rule of law, foreign commentators may not realize that the situation in Bulgaria is critical. Bulgaria’s executive is now headed into the homestretch of capturing the entire justice system. The current unprecedented proceedings against the President of the Supreme Court of Cassation would complete the capture if the plan that shows through – remove him from office – works.

The Homestretch

On 14 December 2018, Bulgaria’s Supreme Judicial Council (SJC) initiated unprecedented proceedings against the President of the Supreme Court of Cassation Lozan Panov to establish if he had threatened judicial independence. To those who follow the downfall of Bulgaria’s rule of law, the goal is clear. Under Article 129(3)(5) of Bulgaria’s Constitution, the President of the Supreme Court of Cassation can be impeached if they undermined the reputation of the justice system – threatening judicial independence fits this hypothesis.

For a Western observer, the circumstances, which led to these proceedings, may appear absurd. On 28 November 2018, pursuant to Article 114(9) of the Law on the Judiciary, Lozan Panov launched [an inquiry](#) following public doubts about administrative malpractice by the Specialized Criminal Court of Appeal. The inquiry [established](#) that the Specialized Criminal Court of Appeal had quashed a ruling by the lower Specialized Criminal Court, without having the protocol of the sitting and before the ruling was even signed by the judicial panel – a distinct case of administrative malpractice. What is striking about the circumstances is that Bulgaria’s prosecution publicly instructed the Specialized Criminal Court of Appeal [not to cooperate](#) with the Supreme Court of Cassation, which is a violation of the hierarchy of the justice system enshrined in the Constitution. While the Specialized Criminal Court of Appeal provided the necessary documents to the Supreme Court of Cassation at the end, they sent [a letter of complaint](#) to the SJC, asking them to establish if the inquiry into their administration constituted institutional pressure.

At the SJC [sitting](#) of 14 December 2018, Lozan Panov was fiercely attacked by members known for their dependence on the executive. Subsequently, with 7 votes in favor of proceedings, the judicial college of the SJC referred the matter to the Judicial Inspectorate – SJC’s division, which is competent to examine such cases. Many [fear](#) that these proceedings are the beginning of the latest large-scale attempt to remove Panov from office.

Years of Abuse

This has not been the first attack on the President of the Supreme Court of Cassation. Rather, he has been subject to shocking harassment since he announced his candidacy for this position in 2014. While he has been extremely vocal about this in public, these incidents have not been included in Bulgaria’s reports under the Cooperation and Verification Mechanism (CVM). In fact, in 2018 these attacks intensified, but the European Commission [provisionally closed](#) the “judicial independence” benchmark, thus demonstrating not only denial of reality, [but also complicity with Bulgaria’s executive](#).

In 2014, when running for President of the Supreme Court of Cassation, Lozan Panov was hit by a car in mysterious circumstances. In the first year of his appointment (2015), he was already talking about overt [pressure by the executive](#): “We need to fight with all strength, we have to ensure that the court has the degree of independence which is necessary to promote the rule of law ... Say no to fear!” In 2017, masked men recreated [a dreadful scene](#) from *The Godfather* when Panov was entering the SJC building. In the same year, the car bolts of his official state car were found to be loosened, but the Prosecutor’s Office [refused to investigate](#) what to many appeared to be an attempt on his life, or at least a serious threat. The prosecution argued the bolts loosened by themselves – a laughable statement dispelled by the producer of the car, Mercedes, themselves. In 2018, Panov publicly [complained](#) the abuses had transferred onto his family because he kept refusing to execute political orders.

Talks of impeachment escalated after Panov gave [a powerful speech](#) about why the judicial system in Bulgaria was not independent, at a MEDEL conference in November 2018, shortly after Bulgaria’s latest CVM report came out. Pro-government media and politicians from the *status quo* accused him of talking like a politician, which, in their opinion, was inadmissible. Of course, this attack is ironic considering that complaining from pressure by the executive is compatible with Bulgaria’s Constitution, which recognizes the judiciary as independent and enshrines the right to free speech and opinion (Article 117(2) and Article 39). Moreover, Article 2(2) of MEDEL’s [Statutes](#) explicitly specifies “the defense of the independence of the judiciary in the face of every other power as well as of specific interests” as one of the goals of the organization – as highlighted above, the speech was given at a MEDEL event.

Thorn in the Side of the Status Quo

Essentially, the Supreme Court of Cassation is the only institution, which needs to be conquered before completing the capture of Bulgaria's justice system. Here is why:

- Omnipotent and politically-dependent Prosecutor's Office

Bulgaria's Prosecutor's Office is often described as "Soviet" because it has not been reformed since communism. It has an entirely vertical structure with no checks and balances, which allow its misuse for political aims, including political persecutions. In 2016, the President of the Venice Commission [argued](#): "The Soviet model of the prosecution must be decisively turned down. It turns it into a source of corruption and blackmail and creates opportunities for its use for political aims." In [Kolevi v Bulgaria](#), the European Court of Human Rights emphasized that Bulgaria was the only country in the Council of Europe, which had endorsed a vertical model, without checks and balances. In other words, all decisions – whether to start or close an investigation, whether to indict someone, etc. – depend on the Prosecutor General who is traditionally faithful to the government.

In communist times, the prosecution was considered more important than the court because it was the mouthpiece of the regime. Hence, Bulgaria's criminal law is skewed in its favor – the prosecution has a monopoly and complete procedural control of the investigation process and the pre-trial phase, and disproportionate powers at the trial stage. Bulgaria has lost [hundreds of cases](#) for violations of Article 6 of the European Convention on Human Rights on similar facts. Instead of making amendments, which bring Bulgarian law in line with the European Convention on Human Rights and enforce the principle of the equality of arms in criminal proceedings, Bulgaria's government carried out a number of reforms, which further limited the rights of accused people and made it almost impossible to challenge procedural violations in local courts.

Sadly, it appears that the European Commission did not take into account the complexity of these unfortunate developments. Because of the 2017 amendments to the Code of Criminal Procedure, the European Commission [declared](#) the benchmark "legal framework" under the CVM provisionally closed. The irony is that these amendments were deemed [anti-constitutional](#) in public statements by the Supreme Court of Cassation, the Association of Bulgarian Judges and tens of NGOs. They seem to violate the European Convention on Human Rights, too.

- Parallel court system (extraordinary tribunals):

Encouraged by the European Commission, in 2009, Boyko Borissov's first government pushed for amendments in the Law on the Judiciary to create the Specialized Criminal Court, which acts as a first-instance and a second-instance of appeal. The institution, which was loosely modeled after the Criminal Chamber of *Audiencia Nacional* in Spain, started functioning in 2011. At the time, judges, politicians from the opposition, and human rights activists raised concern that there was a high risk of violations of fundamental rights. Commentators emphasized

that *Audiencia Nacional* has been criticized in Spain, but has not undergone EU scrutiny (See Y Kuzmova, 'The Bulgarian Specialized Criminal Court after One Year: A Misplaced Transplant, an Instrument of Justice, or a Tool of Executive Power?' (2014) 32 Boston University International Law Journal 228, pp 245-61).

Bulgaria's Specialized Criminal Court has many of the features of an extraordinary tribunal – it has competences by virtue of the profession/personality of the indicted person rather than the crime (for instance, a judge), its procedural rules differ in certain aspects from those of ordinary courts, its existence was justified with the argument of “necessity,” etc. Civil society members have also raised concern about the manner in which the judges in this court were selected – many of them are former prosecutors. Indoctrinated with the culture of Bulgaria's Prosecutor's Office, they are less sensitive to fundamental rights. Moreover, as seen above, the prosecution feels confident to even publicly tell judges from this court what they should do.

While the European Commission has [praised](#) Bulgaria for setting up this specialized court in its CVM reports, many civil society members have condemned it. Essentially, the specialized courts rival the regular criminal chambers in Bulgaria's court system, thus constituting a parallel court system, and have become a venue for harassment of inconvenient opponents of the government.

In light of the above, the Supreme Court of Cassation is problematic for the Prosecutor's Office and the executive – as a final instance of appeal, it can overturn decisions by the Specialized Criminal Court of Appeal. This may also explain why the Prosecutor's Office was extremely irritated that Lozan Panov initiated an inquiry into the administrative malpractices of the Specialized Criminal Court of Appeal, and why the political *status quo* wants the highest-ranking judge eliminated.

- Politically-dependent SJC:

Undoubtedly, the Supreme Judicial Council (SJC) is the most important institution in Bulgaria's justice system. It is responsible for the appointment and promotion of all magistrates (investigators, prosecutors, and judges) as well as for monitoring their ethical values. It has been permanently torn by scandals evidencing corruption and heavy dependence on the executive – see, for instance, [Yaneva Gate](#). Instead of encouraging a substantial reform of the SJC through the CVM, nonetheless, the European Commission accepted Bulgaria's cosmetic 2015 constitutional reform. The [2016 CVM report](#) on Bulgaria indicates that while the constitutional amendments Bulgaria's has made to address SJC's shortcomings are not as extensive as initially planned, “their adoption still represents an important step towards a reform of the SJC.”

This reform did not curtail the political dependences of this institution in any way. To clarify, following the alleged reform, 11 of SJC's 25 members are directly elected by Bulgaria's Parliament whose main criterion, as visible from the candidates who were elected, is the government-likability factor rather than their qualifications and ethical standards. Boyan Magdalinchev, who subsequently became the Representative of the SJC, [had allegedly been implicated](#) into a number of scandals concerning non-

random distribution of case files and manipulation of judicial panels, but this did not prevent the Parliament from electing him for the political quota, without an inquiry. Moreover, 4 prosecutors and 1 investigator who are elected in the SJC are direct subordinates of the General Prosecutor, who is an automatic member of the SJC. As explained above, the prosecution is a mouthpiece of the executive. In other words, the executive may exercise influence on most members of the body.

The political dependencies of these people can be discerned in the way they vote – in a prior [article](#), I showcased how they asked the government how to vote on the suspension of the Polish KRS in the European Network of Councils for the Judiciary (ENJC), which is an anti-constitutional practice. In November 2018, there was [a major controversy](#) about the appointment of the Head of the Sofia City Court, the most important lower court based on its jurisdiction. Of course, one may discern a political motivation in the recent attack against the President of the Supreme Court of Cassation, too. If he gets eliminated with SJC's help, the SJC can appoint a more “likable” and obedient judge in his place, given the current *status quo*.

Critical Times

In conclusion, Bulgaria's executive is on the verge of completing its capture of the justice system. Meanwhile, the European Commission considers the judiciary independent in spite of the fact that Bulgarian high-ranking judges publicly complain from unacceptable pressure, and reputable organizations and civil society members raise concern that the situation is critical.

Could it be that somebody else has already completed the capture of the European Commission itself? While it has become fashionable to refer to Euro elections 2019 as a possible remedy to shatter the *status quo* at an EU level, Bulgaria may be a fully consolidated autocracy by the time the next European Commission is appointed.

